

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF NEW YORK

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ROLANDO DIAZ REYES, HECTOR IVAN BURGOS  
RIVERA, JOSE A. GARCIA MARRERO, KIDANNY JOSUE  
MARTINEZ REYES and EDWIN COSME COLON, as  
individuals and on behalf of all other similarly situated  
persons,

Plaintiffs,

v.

W.D. HENRY & SONS, INC., HENRY REALTY  
ASSOCIATES, INC., DANIEL HENRY, and MARK C.  
HENRY,

Defendants.

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**AFFIDAVIT**

Civil Action No. 1:18-cv-01017

STATE OF NEW YORK     )  
                                      )     S.S.:  
COUNTY OF ERIE         )

**DANIEL M. HENRY**, being duly sworn deposes and says:

1. I am a defendant in this action. I am also a Shareholder, Director and Officer of W.D. Henry & Sons, Inc. ("W.D Henry" or the "Farm") and the President of Henry Realty Associates, LLC ("Henry Realty"), the corporate defendants in this action.

2. I am fully familiar with the facts and circumstances of this action and I make this affidavit in support of Defendants' motion for summary judgment pursuant to Fed. R. Civ. P. 56.

**I. FARMING HISTORY**

3. In 1888, William D. Henry, began a farming operation in Eden, New York. Since its establishment 130 years ago, the Farm has been passed down through my family and is now operating under the management of our family's fourth (4<sup>th</sup>) and fifth (5<sup>th</sup>) generations.

4. The Farm produces fresh produce and greenhouse grown flowers, which it supplies to local grocery stores, produce wholesalers, restaurants, schools, florists, garden centers, fundraisers and landscapers.

5. The Farm has been recognized for its years of dedication to agriculture and has received numerous awards, including: the Award for Outstanding Service (1980), New York State Farm Family Award (1992), Century Farm Award (1997), and Friend of Agriculture Award (2014).

6. The Farm and its owners have also been very active in the community over the years, including participation in the following:

Daniel Henry:

- New York State Farm Bureau Labor Advisory Committee (current member);
- Cornell Cooperative Extension, Erie County – "Farm to School Program";
- Erie County Agriculture & Farmland Protection Board (current member);
- and
- Eden Valley Growers Cooperative (past board member).

Mark Henry:

- New York State Vegetable Growers Association (past president, current treasurer, board member);
- New York State Farm Bureau Commodity Committee (past member);
- Eden Central School District (past board member);
- Niagara Frontier Growers Cooperative Market (past president and board member);
- Cornell Cooperative Extension, Erie County (program committee chair );
- and
- Eden Valley Growers Cooperative (past president and board member).

W.D. Henry & Sons, Inc.:

- Cornell Cooperative Extension, Erie County – "ROOT: Refugee Onsite Occupational Training" (participant 2014-2015) ; and
- Erie 2 Chautauqua – Cattaraugus BOCES "Career & Tech Work Experience" Program (annual participant).

Mark Henry and Bette Henry:

- St. Paul's Lutheran Church of Eden, New York (various positions held)

## **II. SEASONAL LABOR HISTORY**

7. The Farm produces a variety of vegetables available from July through October, holiday potted crops for winter and annuals and perennials for spring.

8. Each year the Farm produces approximately eight (8) million pounds of vegetables. In order to fulfill its crop demand, the Farm hires seasonal workers during the months of March through October.

9. The Farm has employed seasonal workers from Puerto Rico for over thirty (30) years. Initially, approximately 20-30 domestic workers from Puerto Rico would come to the Farm annually to plant, harvest and pack vegetables. However, as demand for locally grown produce increased, W.D. Henry expanded its acreage to meet its demands, which required the help of more seasonal employees to complete the necessary work.

10. Work in production agriculture is physically and mentally challenging. For that reason, W.D. Henry has found it increasingly difficult to attract and retain an ample seasonal workforce. The Farm has not been able to hire enough employees from Puerto Rico to meet its seasonal needs, and many of the domestic workers that do come to the Farm often leave prior to the end of the season, which puts an additional strain on the Farm.

11. Despite a struggling workforce, W.D. Henry has not hired or attempted to hire any undocumented foreign worker that does not have permission to work in the United States, as the Farm strives to be compliant with applicable federal and state laws and does not want to jeopardize its reputation in the agricultural community. This is further supported by my membership on the New York State Farm Bureau Labor Advisory Committee.

12. W.D. Henry has also coordinated with Cornell Cooperative Extension of Erie County to recruit and train refugees from the Buffalo, New York area. The seasonal work available at W.D. Henry, however, has proved to be too challenging for the refugees who need year-round paychecks.

13. In 2016, W.D. Henry was forced to leave hundreds of thousands of pounds of produce in the fields to rot due to a lack of available seasonal labor, which nearly put the Farm out of business.

14. Following the 2016 season, the decision was made to enter into the H-2A program to supplement W.D. Henry's existing workforce. This program was discussed in the past, but due to the cost of the program, W.D. Henry did not believe it was a financially viable solution. However, after the 2016 crop loss, W.D. Henry was forced to either enter the program or cease its vegetable operations.

15. On April 11, 2017, W.D. Henry submitted an H-2A application for forty (40) seasonal H-2A workers from June 15, 2017 to October 7, 2017. This application was accepted by the United States Department of Labor ("USDOL") on May 10, 2017. A copy of the first 2017 Employment Training and Administration (ETA) Form is attached as Exhibit "A" and a copy of the USDOL Certification Letter is attached as Exhibit "B".

16. On May 22, 2017, W.D. Henry submitted an additional H-2A application for eighteen (18) H-2A workers from July 21, 2017 to October 26, 2017. This application was

accepted on July 18, 2017. A copy of the second 2017 ETA Form is attached as Exhibit "C" and a copy of the USDOL Certification Letter is attached as Exhibit "D".

17. On April 23, 2018, W.D. Henry submitted a new H-2A application for the 2018 season for sixty-four (64) H-2A workers. This application was accepted by the USDOL on May 8, 2018. A copy of the 2018 ETA Form is attached as Exhibit "E" and a copy of the USDOL Certification Letter is attached as Exhibit "F".

18. W.D. Henry retains MAS Labor H2A, LLC ("másLabor") as its H-2A agent. másLabor has over fifteen (15) years of experience and expertise assisting employers with the H-2 program and represents over 1,000 businesses in 40 states.

19. W.D. Henry is in constant communication with másLabor; often speaking to its H-2A agent 2-3 times per day during critical months to ensure timely submission of documents and paperwork as well as compliance in all areas of the H-2A program, including advertising, recruitment and transportation.

### **III. RECRUITMENT**

20. With the assistance of másLabor, W.D. Henry has engaged in positive recruitment activities of domestic workers by cooperating with the State Workforce Agency ("SWA") in recruiting eligible U.S. workers who applied for job opportunities at the Farm; running print advertisements in New York, New Jersey and Pennsylvania; and notifying former employees of available work. Copies of the Farm's 2017 "Referral Applicant Logs" showing the domestic applicants for the H-2A qualifying work are attached as Exhibit "G". Copies of the Farm's Recruitment Letters with Print Advertisements are attached as Exhibit "H". Copies of the Farm's 2017 Work Opportunity Notice Letters sent to former employees with certified mail receipts are attached as Exhibit "I".

21. As mentioned above, W.D. Henry maintains detailed records of its positive recruitment efforts by keeping "Referral Applicant Logs" supplied by másLabor, which documents the domestic workers who applied for work at the Farm. As showed in the Referral Applicant Logs, some applicants were offered employment, some were rejected by the Farm, and others declined employment. The following is a summary of W.D. Henry's 2017 recruitment efforts:

- Sixty-six (66) employees that worked for W.D. Henry during the 2016 season were not contacted or re-hired. These employees either left the Farm early or were terminated for cause for various reasons. Several of these employees only worked a couple of weeks, and some even less. The 2016 season was a labor "nightmare";
- W.D. Henry re-hired thirty-two (32) domestic workers from its 2016 season;
- W.D. Henry sent letters to twenty (20) additional workers from the 2016 season (52 contacted overall), notifying them of available work. The Farm did not receive a response from these twenty (20) individuals;
- W.D. Henry received twenty-six (26) new applications from domestic workers; however, only twenty (20) reported for the scheduled interview;
- The Farm offered employment to seventeen (17) of the twenty (20) applicants that were interviewed. Eight (8) applicants declined the job after being interviewed and nine (9) applicants accepted the job and were hired. Three (3) applicants were not hired due to a lack of applicable experience per the H-2A job order, which requires three (3) months of experience working on a commercial vegetable farm;

- Eight (8) of the nine (9) applicants hired by the Farm did not report for work on their scheduled start date;
- The one (1) hired applicant who actually reported for work quit after twenty-one (21) days.

22. In 2018, W.D. Henry contacted its former employees that completed the 2017 season and advised of available work at the 2018 AEWR of \$12.83 per hour. The Farm did not have to contact certain other employees because they were already present at the Farm for the 2018 season. Copies of the 2018 Work Opportunity Notice Letters are attached as Exhibit "J".

#### **IV. OFFER OF H-2A WORK**

23. In 2017, domestic workers were notified of the H-2A job order prior to the commencement of the H-2A contract period which began June 15, 2017. The H-2A program was explained to the domestic workers in English and Spanish. The job description was also explained in English and Spanish as well as the benefits and pay rates under the H-2A job order (\$12.38 per hour). Each employee was interviewed and offered the H-2A job.

24. In 2017, the H-2A work consisted of field harvesting activities, certain crop maintenance (i.e., weeding, thinning, staking and tying plants) and field clean-up, and required three (3) months of applicable experience. It was explained to the domestic workers in English and Spanish that if they chose to decline the H-2A job, they would still have employment opportunities with W.D. Henry in "non-corresponding" positions, including indoor work in the packinghouse. Copies of the Farm's 2017 Work Opportunity Notice Letters advising of alternative work are attached as Exhibit "I".

25. Several of the returning domestic workers who have been with the Farm for a number of years were field supervisors and/or equipment operators, and declined the H-2A work in favor of their existing positions. Notably, however, these supervisors/equipment operators

were still paid a minimum of the AEWR as their positions required higher pay. The remaining domestic workers (except Justo Santiago) declined the H-2A work in favor of indoor packinghouse work or other non-qualifying H-2A work, despite the lower hourly wage. At no time did any Domestic Worker, other than Justo Santiago, perform any H-2A work in 2017.

26. Domestic workers were made aware of the availability of H-2A work. Each employee signed a statement acknowledging that H-2A work was available as of June 15, 2017; that they had been given the opportunity to read the H-2A job order or have it read to them in a language they understand and that they had been given details about the job duties, work days/times, pay rate, experience requirements, directions and more. As I previously mentioned above, besides Justo Santiago, all domestic workers declined the H-2A job offer. Copies of the signed H-2A job offers and denials are attached as Exhibit "K".

27. In 2017, domestic workers either (a) worked in the packinghouse facility; or (b) worked in the field/greenhouse performing non-qualifying H-2A tasks.

28. In 2018, prior to their arrival, W.D. Henry sent Work Opportunity Notice Letters to its former domestic workers that completed the 2017 season advising them that work was available at the hourly rate of \$12.83 per hour. Copies of the Work Opportunity Notice Letters are attached as Exhibit "J".

29. In 2018, domestic workers performed H-2A work because the H-2A job order was all-inclusive; meaning, it included both field work and packinghouse work. As a result, domestic workers were given the same benefits as H-2A workers, including but not limited to, pay at the 2018 Adverse Effect Wage Rate ("AEWR") of \$12.83 per hour and reimbursement for inbound/outbound travel for eligible domestic workers. Copies of the 2018 Agricultural Work Agreements which sets forth the terms of employment between W.D. Henry and the 2018 domestic workers are attached as Exhibit "L".



## **V. WAGES / U.S. DEPARTMENT OF LABOR INVESTIGATION**

30. In 2017, each Domestic Worker received the New York State minimum wage of \$9.70 per hour (greater than the federal minimum wage) for every hour worked, except Justo Santiago, who was in corresponding employment and paid the 2017 AEW of \$12.38 per hour, and those domestic workers in the role of field supervisor or equipment operator who were paid a minimum of \$12.38 per hour. Copies of the 2017 payroll records for the named Plaintiffs, along with a corresponding payroll report for all 2017 domestic workers are attached as Exhibit "M" and a copy of Justo Santiago's wage statement is attached as Exhibit "N".

31. W.D. Henry's 2018 payroll records support that all domestic workers and H-2A workers received pay at the 2018 AEW of \$12.83 per hour. Copies of the 2018 payroll records for domestic workers are attached as Exhibit "O" and copies of the 2018 payroll records for H-2A workers are attached as Exhibit "Y" (a summary of hours worked is attached to Exhibit "Y" for purposes set forth in Paragraph 37 below and is not relevant for this Paragraph 31).

32. In 2017, W.D. Henry did not advance transportation and subsistence costs for its domestic workers because they declined to participate in the H-2A program and were not in corresponding employment.

33. As more fully set forth in the affidavit of my mother, Bette W. Henry ("Bette Affidavit") the USDOL recently investigated W.D. Henry's operations, which included, at the direction of the New York State Department of Labor, an investigation to determine whether W.D. Henry discriminated against domestic workers in favor of H-2A workers. After performing the investigation, the USDOL determined that the Farm was only in violation of regulation 20 C.F.R. 655.122(h)(1) for failing to reimburse six (6) U.S. workers for travel from Puerto Rico to the Farm. These six (6) workers (none of whom are the named Plaintiffs in this

action) were employed in 2018 and came to the Farm during applicable recruitment periods, and have since been reimbursed for travel to the airport in Puerto Rico, air travel, travel from the Buffalo, New York airport and meals. A copy of the USDOL Determination Letter, dated October 1, 2018 is attached as Exhibit "P". A copy of the USDOL Summary of Unpaid Wages is attached as Exhibit "Q". Copies of the Receipts for Payment of Back Wages supplied by the USDOL are attached as Exhibit "R". Copies of W.D. Henry signed Receipts with the corresponding checks are attached as Exhibit "S".

34. The USDOL did not find any other violations and no civil monetary penalty was assessed.

35. It is the Farm's policy to require each employee to review and sign the New York State Department of Labor "Pay Notice and Work Agreement for Farm Workers" ("Work Agreement") in English and Spanish at the time of hire advising of pay, housing, benefits and other terms of employment. Copies of the Farm Work Agreements signed by the 2017 domestic workers, including the named Plaintiffs in this action, are attached as Exhibit "T". Copies of the Farm Work Agreements signed by the 2018 domestic workers are attached as Exhibit "U".

36. Each employee is also given a wage statement with each weekly paycheck advising of the following: dates of work covered by that payment of wages; name of the employee; name of employer; address and phone number of employer; pay rate; gross wages; deductions and net wages. W.D. Henry payroll records support that all employees were paid on a weekly basis. Copies of the Plaintiffs' weekly wage statements are attached as Exhibit "V".

## **VI. HOURS OF WORK**

37. In 2017 and 2018, timecard records support that domestic workers were offered hours equal to or greater than H-2A workers. Copies of the timecard records for the Plaintiffs, with a corresponding summary, are attached as Exhibit "W". Copies of the Time Reports for the

2017 H-2A workers, with a corresponding summary are attached as Exhibit "X". Copies of the Time Reports for the 2018 domestic workers are attached as Exhibit "O", with a corresponding summary attached as Exhibit "Z". Copies of the Time Reports for the 2018 H-2A workers, with a corresponding summary are attached as Exhibit "Y". A summary of those records are as follows:

- 2017 Domestic Workers: Worked an average of 54.56 hours per week
- 2017 H-2A Workers: Worked an average of 49.66 hours per week.
- 2018 Domestic Workers: Worked an average of 63.94 hours per week.
- 2018 H-2A Workers: Worked an average of 60.24 hours per week.

38. The named Plaintiffs in this action averaged the following hours per week:

- Ronaldo Diaz Reyes worked an average of 50.97 hours per week. Copies of Mr. Reyes' timecard records are attached as a part of Exhibit "W".
- Hector Ivan Burgos Rivera worked an average of 50.20 hours per week. Copies of Mr. Burgos Rivera's timecard records are attached as a part of Exhibit "W".
- Jose Garcia Marrero worked an average of 53.71 hours per week. Copies of Mr. Marrero's timecard records are attached as a part of Exhibit "W".
- Edwin Cosme Colon worked an average of 49.41 hours per week. Copies of Mr. Colon's timecard records are attached as a part of Exhibit "W".
- Kidanny Josue Martinez Reyes worked an average of 56.91 hours per week. Copies of Mr. Kidanny Reyes' timecard records are attached as a part of Exhibit "W".

## **VII. HOUSING**

39. All domestic workers are provided housing accommodations, as well as access to W.D. Henry vehicles to travel to and from work, free of charge.

40. Housing is inspected annually by the Erie County Department of Health and migrant labor housing permits are obtained.

41. In 2017, the Farm had to change the housing accommodations offered to its domestic workers living in W.D. Henry on-site housing. These workers were relocated from Farm housing to the Angola Motel located at 9159 Erie Road, Angola, New York. Domestic workers did not have to pay any motel expenses. W.D. Henry paid for the motel and also provided employees with vehicles (with gasoline) to allow them to travel to and from work each day. Workers were also permitted to use the cooking facilities in W.D. Henry's on-site housing prior to returning to the motel. Housing arrangements had to be changed in order to accommodate H-2A workers in accordance with the 2017 H-2A clearance order. Copies of the Angola Motel receipts are attached as Exhibit "AA".

42. In 2018, all domestic workers were engaged in corresponding employment, and therefore, provided with on-site housing pursuant to the terms and conditions of the 2018 H-2A clearance order. At no time in 2018 did W.D. Henry make any changes to the housing accommodations offered to its domestic workers.

#### **VIII. WATER / SANITATION**

43. W.D. Henry has been a participant in the United States Department of Agricultural (USDA) Good Agricultural Practices program (GAP) since 2007. As part of this program, W.D. Henry must provide properly stocked field sanitation units (portable bathroom and hand wash facilities) to all employees. It is also required that potable drinking water and single use cups be provided to all employees. W.D. Henry has achieved USDA GAP

certification with high marks every year of its participation in the program since 2007. Copies of the Farm's 2017 and 2018 USDA GAP Certificates are attached as Exhibit "BB".

44. In order to fulfill its obligation to provide portable bathrooms, the Farm contracts with Ball Toilet & Septic Services. A copy of the Farm's Invoices from Ball Toilet & Septic Services are attached as Exhibit "CC".

45. Domestic workers working inside the packinghouse (i.e., most of the 2017 domestic workers who denied corresponding employment) had bathrooms and water available to them inside the facility.

46. The Farm also provided workers with water coolers, ice and a vehicle to travel to the office to refill water if needed. Some employees also prefer to bring their own water coolers into the field.

#### **IX. TERMINATION OF EMPLOYMENT / FINAL PAYCHECKS**

47. As I note above, the Farm did not have any reason to terminate any of its domestic workers given the labor shortage at the Farm and also because domestic workers and H-2A workers were not performing the same tasks. Therefore, if we terminated a domestic worker, we did not have a readily available workforce ready to fill the position.

48. With respect to the named Plaintiffs, W.D. Henry records show the following:

- Ronaldo Diaz Reyes: Mr. Reyes was terminated for cause for violating work rules after receiving three (3) warnings. Mr. Reyes was observed several times using his cell phone for personal use while at work. He was notified that this is a violation of W.D. Henry work rules, which he reviewed and signed in English and Spanish. Mr. Reyes was warned about cell phone use on August 8, 2017 and August 22, 2017. On August 30, 2017, Mr. Reyes was terminated for exhibiting repeated, lethargic work performance and poor

quality of work. He was verbally corrected numerous times, but unable to perform to W.D. Henry standards. A copy of the W.D. Henry Work Rules signed by Mr. Reyes is attached as Exhibit "DD" and a copy of Mr. Reyes' Warning Notice is attached as Exhibit "EE".

- Hector Ivan Burgos Rivera: Mr. Burgos Rivera alleges that he was forced to quit because he was provided with so few work hours. W.D. Henry time records show that Mr. Burgos Rivera worked an average of 50.20 hours per week; more than the average H-2A worker and more than he was promised in his Work Agreement. A copy of Mr. Rivera's timecard records are attached as a part of Exhibit "W" and a copy of Mr. Burgos Rivera's October 2, 2017 resignation letter is attached as Exhibit "FF".
- Jose Garcia Marrero: Mr. Marrero alleges that he was terminated despite work still being available. Similar to Mr. Diaz Reyes (above), Mr. Marrero was terminated for cause after three (3) warnings for failing to follow work rules, which he reviewed in English and Spanish and signed on July 12, 2017. Mr. Marrero received warnings on July 26, 2017, August 17, 2017 and August 30, 2017. A copy of the W.D. Henry Work Rules signed by Mr. Marrero is attached as Exhibit "GG" and a copy of Mr. Marrero's Warning Notice is attached as Exhibit "HH".
- Kidanny Josue Martinez Reyes: On October 11, 2017, Mr. Martinez Reyes abandoned his employment with W.D. Henry while work was still available. However, prior to the 2018 season, Mr. Martinez Reyes was still contacted by W.D. Henry and offered employment for the 2018 season. Mr. Martinez Reyes verbally committed to report to W.D. Henry between May 1, 2018 and

May 7, 2018; however, he failed to show. On May 8, 2018, W.D. Henry sent a letter to Mr. Martinez Reyes advising him that work was still available.

Mr. Martinez Reyes did not report for work until May 31, 2018, at which time, he advised W.D. Henry that he did not report as scheduled because he was "playing baseball in Puerto Rico" and his season was not finished. At the time of his arrival, his position had been filled and no work was available. However, W.D. Henry still offered Mr. Martinez Reyes H-2A corresponding work beginning June 30, 2018. Mr. Reyes accepted the H-2A position, but again, did not report for work. A copy of Mr. Martinez Reyes' 2017 resignation is attached as Exhibit "II". A copy of the work opportunity notice sent to Mr. Martinez Reyes is attached as a part of Exhibit "JJ". A copy of my internal Memorandum prepared contemporaneously with Mr. Martinez Reyes' arrival is attached as Exhibit "KK".

- Edwin Cosme Colon: Mr. Colon voluntary abandoned his employment with W.D. Henry. A copy of Mr. Colon's signed Abandonment Form dated August 21, 2017 is attached as Exhibit "LL".

49. The resignations by Edwin Cosme Colon and Hector Ivan Burgos Rivera prior to the end of the season forced W.D. Henry to complete the season with a "skeleton crew" which put the business in jeopardy of not meeting its seasonal demands.

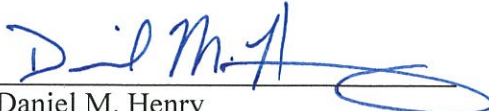
50. At no time has any owner of the Farm engaged in any coercive behavior in order to get an employee to sign a job abandonment form. It is standard practice at this Farm to hold "exit interviews" with departing employees to exchange paychecks and complete necessary paperwork.

51. For all the reasons set forth herein and in the accompanying affidavits and Memorandum Of Law, it is respectfully submitted that the Defendants' motion for summary judgment be granted and that Plaintiffs' Complaint be dismissed with prejudice.

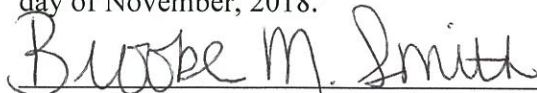
Dated: November \_\_\_, 2018



Dated: November 19, 2018

  
Daniel M. Henry

Sworn to me before me this 19  
day of November, 2018.

  
Notary Public – State of New York

 Brooke M. Smith  
Notary Public - State of New York  
No. 01SM6340075  
Qualified in Erie County  
My Commission Expires 4/11/20